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No. 81-2215

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

H. L. MOORE DRUG EXCHANGE, division of/and LEVITT INDUSTRIES, INC.,

Petitioner,

- against -

ELI LILLY AND COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Six years ago the respondent, Eli Lilly and Company,* notified the petitioner, H.L. Moore Drug Exchange, that Lilly would not renew its distributorship

*Pursuant to Rule 28.1 of the Rules of this Court, respondent sets forth below the names of all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of the respondent, with their jurisdiction of organization in parentheses: Elanco Ihara K.K. (Japan); Dongyang Elanco Co., Ltd., (Korea); Albula, Cia. de Servicios Generales, S.A. (Spain); Lilly-Farma, Lda. (Portugal); Lilly Indiana de Espana, S.A. (Spain); Dista, S.A. Espanola (Spain); Elanco Veterinaria, S.A. (Spain); Sefri, S.A. (Spain); Elquiber, S.A. (Spain); Grima Quimica, S.A. (Spain); Elanco Quimica Cordobesa S.A. (Spain); Valquimica, S.A. (Spain); Controlpest Ambiental, S.A. (Spain); Controlpest Ecologica, S.A. (Spain); Elanco Agricola, S.A. (Spain); Elanco Premezclas, S.A. (Spain); Elardil, S.A. (Spain); Informet, S.A. (Spain); Elanco Industrial, S.A. (Spain); Quimel, S.A. (Argentina);

agreement with Moore because Moore's decision to acquire a chain of retail pharmacies was incompatible with Lilly's decades-old policy of selling its products only to wholesalers, and not directly to retail pharmacists or entities which conducted both wholesale and retail pharmacy businesses. Moore brought this suit, alleging that the reason given by Lilly was false and was contrived to conceal the real reason for the non-renewal, which, according to Moore, was rooted in a conspiracy among Lilly and its wholesalers to maintain resale prices and allocate territories among the wholesalers.

A jury verdict was returned for Moore, and Lilly moved for judgment n.o.v. In his decision on that motion, the district judge noted that "this court would not have found that Moore was terminated as a result of a conspiracy to restrict prices and territories." Appendix to petition ("App.") A-29. Nevertheless, he denied the motion, finding that Moore's evidence was "enough—albeit barely—to support the jury's verdict." App. A-40. Judgment was entered awarding damages to Moore and enjoining Lilly from ceasing to deal with Moore for a period of up to three years.

Lilly appealed from the judgment and the order denying the motion for judgment n.o.v. The court of appeals reversed and ordered that the complaint be dismissed, finding that the evidence was insufficient to support the verdict. Moore then petitioned for rehearing, with a suggestion of en banc consideration, arguing, inter alia, that evidence was erroneously excluded at trial and that the case should be remanded to permit Moore to

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Biofar Insumos Quimico-Farmaceuticos, S.A. (Brazil); Japan Elanco Company, Limited (Japan); Shionogi Lilly Kabushiki Kaisha (Japan); CPI Cardiolab, S.A. (Argentina); CPI Espana, S.A. (Spain); Sociedad Anonima Espanola Elizabeth Arden (Spain); Commercial Arden, S.A. (Spain); Derly, S.A. (Spain); and Indisa, S.A. (Spain).

seek a new trial in the district court. That petition was denied. Moore now seeks a second appellate review from this Court.

In its attempt to obtain that second review, Moore mischaracterizes the holding of the court of appeals, misrepresents the record and argues for a rule of procedure that would prohibit a court of appeals from directing the entry of judgment when it reverses the denial of a defendant's motion for judgment notwithstanding the verdict. Despite Moore's attempts to create an issue worthy of this Court's consideration, the only issue presented by this case is whether its particular record facts were sufficient to support the jury's verdict. That is not an issue which this Court need consider, and the petition for certiorari should be denied.

ARGUMENT

I

THE COURT OF APPEALS APPLIED THE CORRECT LEGAL STANDARD IN REVIEWING THE EVIDENCE.

In an effort to create the appearance of a "certworthy" issue, Moore suggests that the Second Circuit interpreted *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), to require direct evidence to prove an antitrust conspiracy. Nothing in the Second Circuit's opinion supports the suggestion that the Second Circuit relied on *Continental T.V.* or required direct evidence to prove an antitrust conspiracy.

Continental T.V. is not even mentioned in the decision of the court of appeals. Nor was it mentioned in any of the briefs below, and with good reason: the issue in *Continental T.V.* was the reasonableness of unquestioned vertical restraints of trade, whereas in this case the sole issue has been the existence of any agreement to restrain trade. Lilly has never argued that any restraints it agreed to might have been reasonable; its argument has consistently been that the agreements in restraint of trade alleged by Moore simply did not exist. It cannot be seriously argued that *Continental T.V.* has any bearing whatever in this case.

Equally far afield is Moore's suggestion that the Second Circuit has imposed a direct evidence requirement to prove an antitrust conspiracy. To the contrary, the Second Circuit's opinion repeatedly affirms the relevance of circumstantial evidence in such cases:

> Conspiracies, of course, are rarely evidenced by explicit agreements, but must almost always be proved by "inferences that may fairly be drawn from the behavior of the alleged conspirators." *Mi-*

chelman v. Clark-Schwebel Fiber Glass Corp., supra, 534 F.2d at 1043.

App. A-77. And, again:

> We are fully aware of the principle that, although important items of circumstantial evidence considered separately may not justify an inference of combination or conspiracy, they may be sufficient when viewed together as part of one mosaic. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 698-99, 82 S. Ct. 1404, 1409-10, 8 L. Ed. 2d 777 (1962). However, in this case, even when the items relied upon by Moore are taken together and considered against the background and surrounding circumstances, they did not entitle the jury reasonably to infer the existence of a conspiracy. Any such inference would of necessity have had to be based on speculation.

App. A-99.

Although Moore then discusses its interpretation of the record facts at length* in an effort to suggest that the Second Circuit applied the wrong standard in reviewing that record, Moore is, in reality arguing with the Second Circuit's conclusion that any inference of conspiracy in this case "would of necessity have had to be based on speculation." *Id.* Nothing in the Second Circuit's opinion suggests that it was doing anything other than what it said it was doing—applying the standard enunciated by this Court in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 698-99 (1962), and other

*Although Moore, in its effort to overcome that holding, has once again indulged in what the court of appeals referred to as "inaccurate characterization," App. A-88, we have refrained from a point-by-point rebuttal, since a brief in opposition to certiorari is not the proper occasion for such a rebuttal.

cases, for determining whether there is sufficient evidence of an antitrust conspiracy in this case.

The court of appeals, fully aware of the proper standard of review, carefully reviewed the record below and reached the correct result. In any event, its decision that the evidence in this particular case was not sufficient to support the verdict presents no federal question of such importance as to require the time and attention of this Court. Sup. Ct. Rule 17.

II

THE COURT OF APPEALS WAS WITHIN ITS DISCRETION IN DENYING A NEW TRIAL.

Moore phrases its second question presented as follows:

> Whether a Court of Appeals which reverses a verdict may deprive the verdict winner of a requested opportunity to make a new trial motion in the District Court?

Pet. i. Moore's implicit answer to that question is that a court of appeals does not have the power to direct the entry of judgment against an appellee; the court must instead remand to the district court to have it pass on any new trial motion that the losing appellee might desire to make. This position cannot be supported by logic or law.

Notwithstanding the position implicit in the question as presented, in its argument Moore contends merely that in *this* case, the Second Circuit's exercise of that power was an abuse of discretion. In doing so, Moore necessarily concedes that a court of appeals in fact has the power to direct the entry of judgment against an appellee.

Moore first raised its new trial arguments in its unsuccessful petition for rehearing in the court of appeals.

Its petition argued that the district court had erroneously excluded two items of evidence Moore considered helpful to its case.* Moore did not suggest in its petition for rehearing (nor does it suggest now) why it had any reason to hope that the new trial request would be favorably received by the trial judge, who, after all, had made the allegedly erroneous evidentiary rulings.

The petition for rehearing was denied without opinion. Only two reasons for the disposition suggest themselves: the court of appeals either considered that the

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*These two items are the same ones discussed in Moore's petition. Pet. 23-24. The first was Mr. Moore's hearsay testimony that Mr. Katz (one of some 1200 Lilly salesmen) said to him "that I [Moore] am a thorn in the side of Lilly." (Trial transcript, p. 70.) In fact, the trial judge, under the erroneous impression that Mr. Katz had been speaking as an agent on a matter within the scope of his agency under Fed. R. Evid. 801(d)(2)(D), permitted the jury to hear this testimony. It was only after a recess during which the judge became aware of his misunderstanding that he instructed the jury to disregard that evidence. Contrary to Moore's representations, Mr. Moore did not testify that Mr. Katz or anyone else had said that Lilly had "a common understanding with complaining customers that Moore's discounting and interterritorial sales were a 'thorn' in Lilly's side." Pet. 23-24. Nor is there any support for Moore's statement that "[t]he district court's exclusion of this evidence was made, at least in part, in light of its summary judgment holding that there was otherwise enough evidence to support a jury inference of conspiracy." Pet. 24.

The other item of excluded evidence relates to an industrial spy who, at the instigation of a pharmaceutical manufacturer other than Lilly, obtained employment at Moore's warehouse in 1966. When Moore discovered the spy, it brought suit against 47 pharmaceutical manufacturers and wholesalers, including Lilly. That suit was settled between Lilly and Moore in 1971, five years before the events giving rise to this lawsuit occurred, with Lilly agreeing to accept Moore as an authorized wholesaler. Again, contrary to Moore's representations, Pet. 23 n.19, the district court did not rule that this evidence was relevant. To the contrary, the ruling was as follows:

> "THE COURT: I don't think Saviano [the industrial spy] cuts any ice.
> "MR. LUSTIGMAN: That a detective agency was hired?
> "THE COURT: No, I don't think that is relevant."

Trial transcript, p. 5.

trial judge's rulings were correct or considered that the excluded evidence, if admitted, would not have been sufficient, when taken together with other record evidence, to support a verdict against Lilly. According to Moore, the proper course for the court of appeals, regardless of its view on these evidentiary questions, was to remand to permit the trial judge to rule on the new trial motion. Presumably, if the trial judge adhered to his original evidentiary rulings, he would deny the motion, and, on appeal, the court of appeals could reach the conclusion Moore seeks to postpone. If, on the other hand, the trial judge granted the motion for a new trial—an unlikely event, given his statements below—the court of appeals, on the ensuing appeal, would once again reach the same conclusion on those evidentiary issues. Moore suggests no sound reason for requiring this procedural chutes-and-ladders game.

As this Court explicitly recognized in *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317 (1967), a final disposition by a court of appeals in these circumstances is entirely appropriate. The Court in *Neely* recognized that cases involving new trial requests made by a party, such as Moore, which has successfully resisted a motion for judgment n.o.v. in the district court only to lose on that issue in the court of appeals, would sometimes fall into a gray area where the new trial issue should more appropriately be resolved by the district court than by the court of appeals.* However, *Neely* also recognized that in some categories of cases the new trial

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Iacurci v. Lummus Co., 387 U.S. 86 (1967), fell into that gray area and therefore can hardly be claimed to be "irreconcilable" with *Neely*, as Moore suggests. Pet. 27. The right to a new trial in *Iacurci* turned on the explanation for the jury's failure to follow the instructions contained in the special interrogatory submitted to it. Because no explanation was suggested by the record on appeal, the court of appeals was in a poorer position than the district court to evaluate the new trial issue.

issue may readily be decided in the court of appeals, and the Court specifically stated that one such category consisted of cases in which the erroneous exclusion of evidence is claimed as the basis for a new trial:

> [W]here the court of appeals sets aside the jury's verdict because the evidence was insufficient to send the case to the jury, it is not so clear that the litigation should be terminated. [T]here remain important considerations which may entitle [the plaintiff-appellee] to a new trial. The erroneous exclusion of evidence which would have strengthened his case is an important possibility.[*] . . . But issues like these are issues of law with which the courts of appeals regularly and characteristically must deal. The district court in all likelihood has already ruled on these questions in the course of the trial and, in any event, has no special advantage or competence in dealing with them. They are precisely the kind of issues that the losing defendant below may bring to the court of appeals without ever moving for a new trial in the district court. Cf. *Globe Liquor Co. v. San Roman*, 332 U.S. 571, 574. . . . Final action on these issues normally rests with the court of appeals.

386 U.S. at 327-28.

In concluding its discussion of the new trial issue, Moore remarks that "[t]he Second Circuit appears to have adopted the practice of denying as a matter of course applications for a new trial when raised in petitions for rehearing." Pet. 27. Moore cites no evidence whatever of this supposed practice, but if Moore genuinely believes that this practice exists, it should not have

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[*]Moore ends its quotation of this passage from *Neely* at this point, Pet. 25, leaving the erroneous impression that the Court did not go on to deal with the very question presented in Moore's petition.

waited until its petition for rehearing to raise the new trial issue. As the Court noted in *Neely*:

> [T]he appellee can choose for his own convenience when to make his case for a new trial: he may bring his grounds for new trial to the trial judge's attention when defendant first makes an *n.o.v.* motion, he may argue this question in his brief to the court of appeals, or he may in suitable situations seek rehearing from the court of appeals after his judgment has been reversed.

386 U.S. at 328-29.

Petitioner's second question presented raises no issue worthy of certiorari. *Neely* not only authorizes, but encourages, courts of appeals to resolve new trial requests based on the exclusion of evidence, and neither *Iacurci* nor any other case since *Neely* is inconsistent with it.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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June 25, 1982

CERTIFICATE OF SERVICE

The undersigned, a member of the Bar of the Supreme Court of the United States, hereby certifies that on this 25th day of June, 1982, pursuant to Rule 28.3 of the Rules of this Court, three copies of the Brief in Opposition were mailed, first-class postage prepaid, to Milton A. Bass, counsel of record for petitioner H. L. Moore Drug Exchange, at the firm of Bass, Ullman & Lustigman, 747 Third Avenue, New York, New York 10017. I further certify that all parties required to be served have been served.

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